IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLEES GRAF AND COMERFORD

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Appellees.

Appeal from a Three Judge Court of the United States District Court For The Western District of New York

BRIEF ON BEHALF OF APPELLEES GRAF AND COMERFORD

Questions Presented.

1. Whether dismissal of a prior action brought in the Federal Court by the County of Niagara on behalf of its

citizens and voters against the State of New York, which raises substantially the same issues as are raised in this action, constitutes a bar to this class action under the doctrine of *Res Judicata*?

2. Whether the subject matter of this case, the constitutionality of Article IX, Section (1)(h)(1) of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York, which arose in regard to the 1972 Charter and which arose again in the 1974 Charter, is moot?

3. If not, whether the creation of dual voting units of unequal population within a single political subdivision of a state, consisting of a majority of those voting in areas outside of the cities in the County and by a majority of those voting in the cities within the County in reference to a county charter form of local government, so dilutes and debases the right of the county-wide majority as to violate the equal protection clause of Amendment Fourteen to the United States Constitution.

4. Did the District Court exceed its jurisdiction in reinstating and amending its original judgment by decreeing that the 1974 County Charter supersedes the 1972 County Charter, and that the 1974 Charter be in full force and effect as the instrument defining the form of local government for Niagara County?

Statement of Facts.

In November, 1972, the voters of the County of Niagara adopted a Charter by referendum vote with the following results:

	FOR	*AGAINST*
Cities	18,220	14,914
Towns	10,665	11,594
Totals	28,885	26,508

In November, 1974, a charter was placed on the ballot for Niagara County and the following vote was had:

	FOR	*AGAINST*
Cities	11,305	9,222
Towns	8,059	8,222
Totals	19,364	17,444

Both charters were passed by a total majority of the persons voting in the referendum.

The County Attorney ruled that only a majority of the votes cast were needed to pass the charter voted upon in November, 1972, by the plain meaning of Article IX, Section (1)(h)(1) of the New York State Constitution, and Section 33, Subdivision 7 of the Municipal Home Rule Law of the State of New York which implements Article IX, Section (1)(h)(1) of the New York Constitution.

The Secretary of State of the State of New York refused to accept for filing the Charter adopted in 1972 on the grounds that the 1972 Charter did not pass by a majority of votes in the areas outside of the cities in the County and by a majority of those voting in the cities within the County, by a separate majority vote.

The County of Niagara, relying on the opinion of the County Attorney, brought an action challenging the refusal of the Secretary of State to accept the 1972 Charter for filing.

The Title of the action was County of Niagara vs. The State of New York—Civil 1972—656 (District Court for the Western District of New York). This action was dismissed by Honorable Judge John O. Henderson who found no substantial federal question requiring the convening of a three-judge Court (A-178). Judge Henderson states:

> "Where a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *Gomillion v. Lightfoot* 364 U.S. 339, 347 (1960).
>
> Title 28, United States Code, Section 2281 does not require the convening of a three-judge court when the constitutional attack upon a state statute is insubstantial . . . The facts presented by this case do not raise a substantial federal question.
>
> *In light of the foregoing, this court does not reach the other contentions of the Plaintiff.* Plaintiff's motion to convene a three-judge court is denied. The motion of Defendant to dismiss is granted." (Emphasis supplied).

It was decided by the County Legislature of Niagara County not to appeal the District Court's decision on the 1972 Charter and to propose a different Charter which the voters might find more acceptable. The County of Niagara was not enjoined by Judge Henderson's decision from taking such action, nor by any subsequent order. The results of the November, 1974 referendum were as previously stated and raised the same issue as did the referendum on the Charter adopted in November, 1972. This is a matter capable of repetition yet evading review.

In the meantime, Plaintiff-Appellees, on May 7th, 1973, commenced an action for the same relief and a three-judge Court was convened by Judge John T. Curtin

(W.D.N.Y.) and resulted in a judgment (A-130), 386 F. Supp. 1 (1974), which related to the Charter adopted in November, 1972 (A 146-147).

The provisions of the judgment of January 9, 1975 (A 146-147), declared Article IX, Section (1)(h)(1) of the New York State Constitution and Section 33, Subdivision (7) of the Municipal Home Rule Law of the State of New York were unconstitutionally in violation of the equal protection clause of the Fourteenth Amendment; and, the Court ordered the implementation of the Charter adopted in November, 1972.

After an intervening appeal, the three-judge District Court on remand from the United States Supreme Court, ordered implementation of the Charter adopted in November, 1974 by a judgment entered December 15, 1975 (A 167-169).

The appellants brought a special proceeding in New York State Supreme Court attacking the 1974 charter. The State Court dismissed this special proceeding on the 28th day of July, 1975 after adopting the reasoning of the Federal District Court. The State Court further found that all New York State procedures for filing a charter had been complied with.

Pursuant to the 1974 Charter, a County Executive was elected in November, 1974 and is now serving. County Legislators have been elected to four-year terms, and many department heads appointed and departments implemented by the hiring of staff personnel. A Commissioner of Finance will be elected in November, 1976.

The three-judge Court had both the 1972 and 1974 Charters before it on remand from the United States Supreme Court and also the necessary statutory law. The Court states (A 165):

> "First of all, as admitted by the Town of Lockport and as is evident from a perusal of the 1972 and 1974 Charters, there is no substantial difference between the two Charters. The only differences are merely technical ones relating to the functions and duties of the various officers and branches of the proposed county government."

There is no question that all either charter doss is to streamline administrative functions of county government. Section 105 of the 1974 Charter is as follows:

> "Section 105. *Local Government Functions, Facilities & Powers Not Transferred, Altered or Impaired.* No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code."

Summary of Arguments.

Mootness.

The subject matter of this action is not moot since the problem presented herein is one which is capable of repetition, and there still exists a definite and concrete controversy between the parties.

Res Judicata.

Res Judicata is not applicable in this case, since the private citizens who are members of the plaintiff class, in the instant action, are not bound by the judgment in the

prior action because they were not formal parties to that action, and there is no basis upon which to hold them in privity with Niagara County.

Jurisdiction of District Court.

The District Court had jurisdiction to render a decision concerning the 1974 charter and validating it as part of its prior judgment concerning the 1972 charter.

District Court did not Improperly Preempt the Role and Rights of the Electorate.

In regard to appellants statement that there was a "change of rules after the game was played", the District Court states on October 23, 1975, that it "is simply irrelevant to a determination of whether the sections are constitutional". Appellants make an assertion that voters participated in the voting with the idea that a double referendum would be required in November, 1972. This is obviously unprovable and the result of the referendum was the same in November of 1974 when all voters must have known of the controversy between the parties.

Enjoining Prosecution of State Court Action.

The January 9, 1975 judgment by the District Court pursuant to 28 USC, Section 2283 enjoined the Town of Lockport and its agents from proceeding further with any state court action to effectuate the prior District Court's judgment which otherwise would be violated by the state court proceedings.

The Provisions of Article IX, Section (1)(h)(1) of the New York State Constitution and Section 33, Subd. (7) of the Municipal Home Rule Law Requiring Double Referendums are Unconstitutional Under the Fourteenth Amendment of the Constitution of the United States.

The instant case is a violation of a citizen's equal protection under the Fourteenth Amendment. Once a statutory right is granted to a citizen to vote (*Article IX, Section (1)(h)(1)* of the *New York State Constitution; Section 33(7), Municipal Home Rule Law of New York*) that right cannot be conditioned to result in invidious discrimination unless it can be legitimized by compelling state interest. There is no justifiable state interest in having two units, cities and areas outside of cities, voting by dual referendum on a matter which affects both units in the same manner.

POINT I

The issue of constitutionality of Article IX (1)(h)(1) of the Constitution of New York and Section 33(7) of the Municipal Home Rule Law is not moot.

The issue is not whether the 1972 Charter is moot, but whether the issue of the dual referendum requirement established by statutes and needed to pass the 1972 and 1974 Charters, is moot.

First of all, there is no substantial difference between the 1972 and 1974 Charters, as decided by the District Court (A 19-31, 70-127). The issue in both Charters has been the unconstitutionality of the statutes and constitutional provisions in question.

Under the U. S. Supreme Court's direction on remand, the judgment was vacated and the Court directed to consider the 1974 Charter, and the District Court made it the effective instrument for governing Niagara County. The 1974 Charter has been substantially implemented at the present time. Therefore, there exists a live controversy or case before the Court within the meaning of cases such as *Moore v. Ogilvie,* 394 U. S. 814, (1969) and subsequent cases where mootness has not been held if the issue is capable of repetition yet evading review.

POINT II

The action is not barred by *Res Judicata.*

On April 3, 1973, the County of Niagara brought suit against the State of New York on behalf of voters, seeking a declaratory judgment and injunctive relief against enforcement by defendants of Article IX (1)(h)(1) of the New York Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York. The defendant now pleads this dismissal as *res judicata* to the instant case.

Under settled law, three factors must be present to support a defense of *res judicata:*

1. There must have been a "final judgment on the merits" in the prior action.

2. Identical issues sought to be raised in the second action must have been decided in the prior action.

3. The party against whom the defense is asserted must have been a party to or in privity with a party to

the prior action. *Kreager v. General Electric Company,* 497 F2d 468, 471 (2d Cir. 1974), quoting from *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F2d 944, 955 (2d Cir. denied, 337 U.S. 934 (1964)).

These Appellees concede that there was an identical issue in the prior action as in the action presently before the court.

As to the element of plaintiff-appellee being a party to the first action or in privity, the District Court in the decision of the *United States Court for the Western District of New York,* November 22, 1974, 386 F. supp 1, (A-130) concluded that the third requirement of *Kreager, supra,* was absent. The court held that "private citizens who are members of the plaintiff class are not bound by the judgment in the prior action purportedly brought on their behalf, since they were not formal parties to the action and there is no basis upon which to hold them in privity with Niagara County. *Williamson v. Bethlehem Steel Corporation,* 468 F2d 1201, 1203, 1204, (2d Cir. 1972) Cert. denied 411 U.S. 391, 1973; 1(B) *Moore Federal Practice,* Sec. 0.411(1) 2d ed., 1974.

Plaintiff-appellee was not a formal party to the previous action, since he was not named nor did he participate in the prior action, nor can he be considered in privity with the County of Niagara since there was no legal relationship or legal interest which the two share. *International Tel. & Tel. Corp. v. General Telephone & Electronics Corporation,* 380 F.Supp. 976, (M.D.N.C. 1974), and *Falk v. Falk Corporation,* 390 F.Supp. 1276 (E.D.Wis. 1975). In addition, there is no authority for the proposition which appellant put forth, that a political subdivision has privity with its citizens merely by citizenship.

The District Court, *supra,* goes on to state that absent statutory or contractual authority, a person cannot be bound without his consent by a judgment in a prior action to which he was not a party simply because a party to that litigation purports to represent all individuals who share an interest in the subject of the action. *Dudley v. Meyers,* 422 F2d 1389, 1393-1394 (3d Cir. 1970); 113 *Moore,* Section 0.411(1), at 1253, and Section 0.411(3) at 1423; *F. Kersh Lake Drainage District v. Johnson,* 309 U.S. 485 (1940); *United States v. Kabinto,* 456 F2d 1087 (9th Cir. 1972), Cert. denied, 409 U.S. 842 (1972). There was no statutory or contractual authority in the instant case to establish that appellee was in privity with or a party to the previous action. There is also no claim that the County of Niagara was authorized to seek vindication of the constitutional rights of its "citizens and voters", or that any member of the present plaintiff class consented to being represented in the prior action of the court.

The prior action was not commenced nor prosecuted by plaintiff-appellees as a class action on behalf of the voters of Niagara County, since it was not brought pursuant to *Federal Rules of Civil Procedure,* Section 23. If it were brought as a true class action, then the court would have to consider whether proper notice, under *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 172-177 (1974), and adequate representation, *Hansberry v. Lee,* 311 U.S. 32 (1940), were granted to the class. Looking at the facts, we can see that the District Court, in the prior action, was not called upon to make the initial determination under Rule 23 of the *Federal Rules of Civil Procedure* as to whether the County could or would "fairly and adequately protect the interest of the class" claimed by the defendant to have

been represented. See *Federal Rules of Civil Procedure*, Sec. 23 a(4). Nor was the Court afforded the opportunity to consider the desirability or necessity of formulating provisions for notice to the members of the class. *Federal Rules of Civil Procedure*, Sec. 23 d(2), *Eisen v. Carlisle and Jacquelin, supra,* or to deal with similar procedural matters, *Federal Rules of Civil Procedure*, Sec. 23 d(5).

POINT III

The District Court had jurisdiction to render a decision concerning the 1974 Charter and validating it as part of its prior judgment concerning the 1972 Charter.

The District Court had before it, on October 6, 1975, the following order of the United States Supreme Court:

> "The Judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new Charter adopted by Niagara County in 1974."

Under 28 USC 2106, and *Yates v. U. S.*, 354 U. S. 298 (1956) the Supreme Court or any other court of appellate jurisdiction may, affirm, modify, vacate, set aside, or reverse any judgment, decree, or order lawfully brought before it for review and may direct such further proceeding as may be just under the circumstances.

All parties stipulated to have the 1974 Charter as an exhibit upon the remand of the U.S. Supreme Court to the District Court.

On remand, all of the parties consented to making the 1974 Charter part of the record as an exhibit. The District Court on October 23, 1975 stated: A-163

> "The parties stipulated that the 1974 Charter and also the proceeding in the New York State Courts in which the Town of Lockport sought to invalidate the 1974 Charter be marked as exhibits in this case."

A stipulation of fact fairly entered into, where there is no mutual mistake, is controlling and conclusive and courts are bound by it.

U. S. v. 788.16 Acres of Land, More or Less in Emmons County, N D 439 F 2d 291, 1971; *Hoffman v. Celebrezze,* 405 F. 2d 833 (8th Cir. 1969); *Burstein v. U. S.*, 232 F2d 19 (8th Cir. 1956).

POINT IV

The District Court did not improperly preempt the role and rights of the electorate.

The answer to the assertion that the District Court improperly preempted the role and rights of the electorate is the answer that was given by the District Court; that the claim that the voters must know the "rules of the game" is simply irrelevant in the face of a constitutional challenge.

To require another referendum now would inject political issues into the referendum process not present when the 1974 Charter was adopted, such as the performance in office of those who won elections conducted under the 1974 charter, and the political affiliations of those who won contests. It would give the losing candidates for the office of County Executive and County Legislature a chance to defeat the incumbents by indirection.

Section 2402 of the 1974 charter states as follows:

> "Section 2402. *Amendment of Charter.* This charter may be amended in the manner provided by law. Except as otherwise provided in this charter, any local law which would create or abolish an elective county office . . . shall be subject to mandatory referendum . . ."

Subsequent sections provide for a Charter Review Board and a systematic review of the charter.

If change or repeal of the 1974 charter is desirable, the state legal machinery is present to allow such change in an eminently equitable manner.

A new referendum on the charter proper would result in almost complete chaos in Niagara County government and impair the validity of official acts taken since January 1, 1976. It would also produce years of litigation and a multiplicity of lawsuits. This could not be an equitable result nor an economically provident one.

In the general elections of November, 1975, political power was taken from one major party and given to another by the will of the voters. Naturally, the losers want to change this result, if possible, by destroying the 1974 charter. They want to change the result of the recent elections, after they have been held.

POINT V

There was no impermissible interference with pending State Court proceedings.

Under *Younger v. Harris,* 401 U.S. 37 (1971) and *Huffman v. Pursue,* 420 U.S. 592 (1975) as they relate to 28 U.S.C., Sec. 2283, the District Court had to issue an in-

junction to sustain its judgment. The State Court proceedings were before the District Court on remand by stipulation. The constitutional determination had already been made. To accept appellants' contentions would give New York State Courts the right to review a matter already decided, which could again be presented to the United States Supreme Court.

As to the question of procedural defects in filing the 1974 charter, that issue was resolved against appellants in the state courts. Administratively, the Secretary of State of the State of New York has filed the charter. In any event, appellants should have raised it on remand to the District Court since the remanded direction vacated the District Court's judgment. They had every opportunity to raise the issue and failed to do so.

POINT VI

The provisions of Article IX, Section (1)(h)(1) of the New York State Constitution and Section 33, subd. (7) of the Municipal Home Rule law requiring double referendums are unconstitutional.

There can be no disagreement with *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) in a general sense. New York State, with a proper procedure, could abolish all referenda for adoptions of charters in political subdivisions.

Voting when granted by a state is a federally protected right espoused by many decided cases and a state is not insulated from Federal Judicial review in regard to a violation of it.

Gomillion v. Lightfoot, supra, held that the right of all voters to participate on an equal basis in elections for representatives of the people was such a right.

To say that each voter has an equal right to vote for county legislators from comparable districts and generally for a county executive, but not an equal right to vote for a form of government under which such legislators and Executive are guided and constrained is a perversion of the *Gomillion* doctrine. *Wells v. Edwards,* 347 F. Supp. 453, at 455 (M.D. La. 1972), aff'd 409 U. S. 1095 (1973) only limited the general rule where judges are concerned; judges being persons not directly involved in the elective political process of governing the populace.

The right of equal citizens to vote for a form of government equally affecting all of them is directly within the contemplation of such cases as *Gray v. Sanders,* 372 U. S. 368 (1962) and *Avery v. Midland County,* 390 U.S. 474 (1967).

Addressing the decision of *National League of Cities v. Usery,* 44 U.S.L.W. 4974 (U.S. June 24, 1976), raised by the Appellants, it is clear it has no relevance to this case. The Federal Government is not forcing its will on the State of New York by the District Court's decision but only saying that if you hold an election, each citizen equally affected has an equal vote.

What rational or compelling State interest has been posited to justify and defend the veto power given to the towns as a group and the cities as a group to defeat a charter affecting equally all citizens as a group?

In *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973) landowners only were allowed to vote as opposed to others because landowners were paying the cost of a service benefit district. That would seem to be a valid distinction to limit a federally protected right.

Salyer can be distinguished factually from the present case. *Salyer* involved the election of directors of a California Water Storage District which had been formed only to provide water to farmers in the Tulare Lake Basin. The cost of the project undertaken by the defendant water storage district was assessed against the land serviced by the district in proportion to the benefits received. The limited purpose of the district was held to warrant the challenged voting scheme whereby each voter was entitled to cast one vote for each $100 value of land and improvements owned. Unlike the situation in *Salyer,* the functions which are to be performed by the County of Niagara government under its Charter are of a general governmental nature. Such governmental functions clearly would affect all residents of Niagara County equally. No one in Niagara County would have a special interest in the 1974 Charter and there are no unusual or limited purposes of government found in the Charter warranting a *Salyer* type result.

A group of cases discredit the defendant-appellant's position, beginning with *Kramer v. Union School District No. 15,* 395 U.S. 621 (1969). In *Kramer,* the court invalidated municipal referenda on the grounds that they contravened the Equal Protection Clause of the Fourteenth Amendment. *Kramer,* the first of these cases, overturned Section 2012 of the New York Education Law which re-

stricted otherwise qualified voters from participating in school district elections unless they either owned or leased realty in the area or were parents of school children in local schools. The Court concluded at the outset that the provisions would be subject to strict scrutiny "to determine whether each local resident has as far as possible, an equal voice". In *Cipriano v. Houma,* 395 U.S. 701 (1969), the court declared a violation of the Fourteenth Amendment regarding a statute which limited the voting franchise in municipal utility bond election to property taxpayers. In *City of Phoenix v. Kalodziepki,* 399 U.S. 204 (1969), the court invalidated the limitations placed on elections regarding the issuance of general obligation bonds. Therefore, the Supreme Court has already applied the one man-one vote principle to non-representational referenda. In all three cases, *Kramer, Cipriano* and *Phoenix,* the attempt to narrow the elective to "those who were primarily interested" was not found to satisfy the compelling state interest requirement of the Fourteenth Amendment. The most recent addition to this line of cases is *Hill v. Stone,* 421 U.S. 289, 95 Sct. 1637 (1975). The court in *Hill* nullified provisions of the Texas Constitution and Election Code as well as the Fort Worth Charter, which limited the franchise in municipal bond elections to property owners. The Court concluded that the bonds were not a matter of "special interest" to property owners, and neither was there a compelling state interest to justify limiting the franchise. *Hill* appears to be dispositive of the issues in this case. The Texas "dual box election procedure" was determined to be a violation of the Fourteenth Amendment. In *Hill,* a bond election was involved in which people owning property voted as a

group and non-property owners voted as a group. The claim that there was a special interest which negated the impact of the Fourteenth Amendment and that such special interest represented a compelling state purpose, was rejected. The dual referendum requirement in question before this Court in the present case is an even greater violation of the Fourteenth Amendment than found in *Hill v. Stone, supra.* The present case involves only general governmental powers. The townspeople of the County of Niagara have not acquired a "special interest" over the city people on the adoption of the Charter, nor can it be proven that they do have a special interest; nor can the reverse be proven. The Charter was created to affect all individuals in the County, Towns and Cities equally, with the provisions affecting the same equally.

Since the townspeople or city dwellers have not acquired a special interest, and there is no compelling state interest to justify limiting or diluting equal voting rights, the statute and constitutional provision must fall for violating the Fourteenth Amendment.

The defendants proceed to argue that because of the potential long-range untold consequences of the Niagara County referendum, the State was justified in placing the responsibility for such a fundamental change as that affecting the form of government in the hands of a super-majority. They argue further that since each of the separate voting units within Niagara County might have vetoed the adoption of the Charter, the dual majority requirement did not authorize discrimination against any identifiable group and therefore did not violate the Fourteenth Amendment. No it didn't. It authorized discrimination against two identifiable groups.

The case of *Gordon v. Lance*, U.S. 1 (1971) is clearly distinguishable from the instant case. In *Gordon*, the Supreme Court upheld a 60% super majority requirement in referendums on general obligation municipal bonds and increased tax levy. They held that there was no identifiable group which was shown to be discriminated against. The Supreme Court concluded "it must be remembered that in voting to issue bonds, voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand". In the instant case there is no such long range consequences of the Charter form of government. Also, if census statistics are resorted to, there is an unlimited potential for discrimination of blacks within the cities of the County of Niagara. This is a consideration worth noting and for requiring a strong state interest if defendant-appellants are to justify a dual referendum requirement.

Gordon is also distinguishable on yet additional grounds:

First, the dual majority requirement of the instant case does not provide, as defendants-appellants suggest, for a simple majority vote. In fact, the dual majority requirement of the instant case has a potential for unlimited dilution of the majority vote. Conceivably, a Charter could lose by one vote in either the towns or cities and be passed by a tremendous majority overall. In *Gordon* there was a super-majority limit of 60%.

Second, unlike the situation in *Gordon*, the dual majority requirement does discriminate against and did dilute and debase the vote of an identifiable group, both the City dwellers of Niagara County and town dwellers.

Third, the Court in *Gordon* reaffirmed the holding in prior cases that where there was a dilution of voting power based on geographical location, it was impermissible if there was no valid special relationship to the interest of those groups in the subject matter of the election.

Previously, these Appellees have shown in this document that there is no legal or factual differential upon the impact of this Charter upon the categories of City residents as distinguished from Town residents.

Had the State of New York accepted these Appellees original construction of the New York Constitution and Municipal Home Rule Law to the effect that a dual referendum was required only when there was a transfer of functions, powers or duties or other infringements upon existing cities or towns, in a proposed Charter, the Appellants might have some validity to their arguments. But that issue is foreclosed.

POINT VII

The judgment below should be affirmed.

Respectfully submitted,

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